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In the Supreme Court of the United States

OCTOBER TERM, 1948

WASHINGTON PENSION UNION,
Petitioner,

vs.

THE STATE OF WASHINGTON, on the Relation of Dana T. Robinson,
Respondent.

No. 221

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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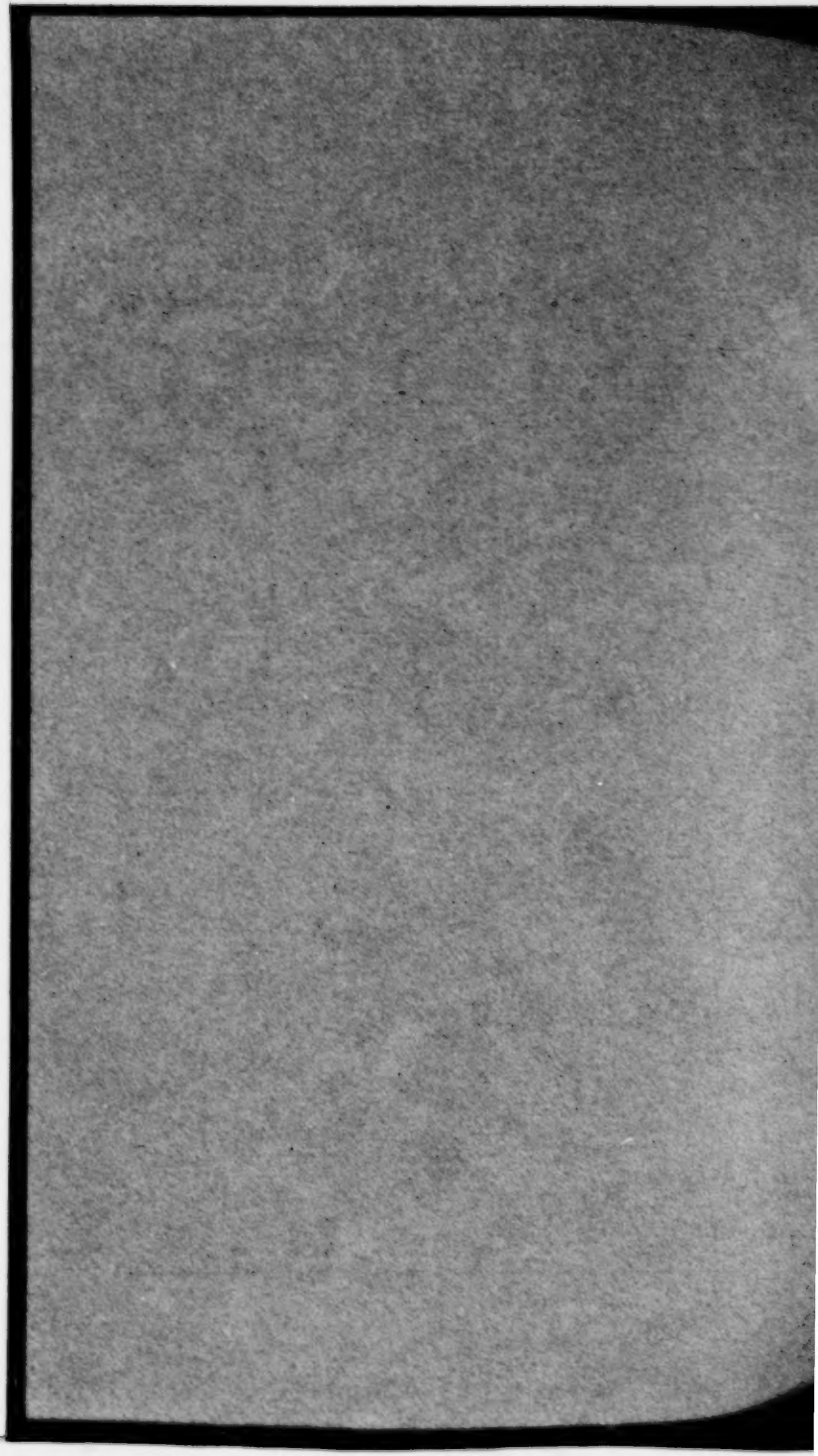

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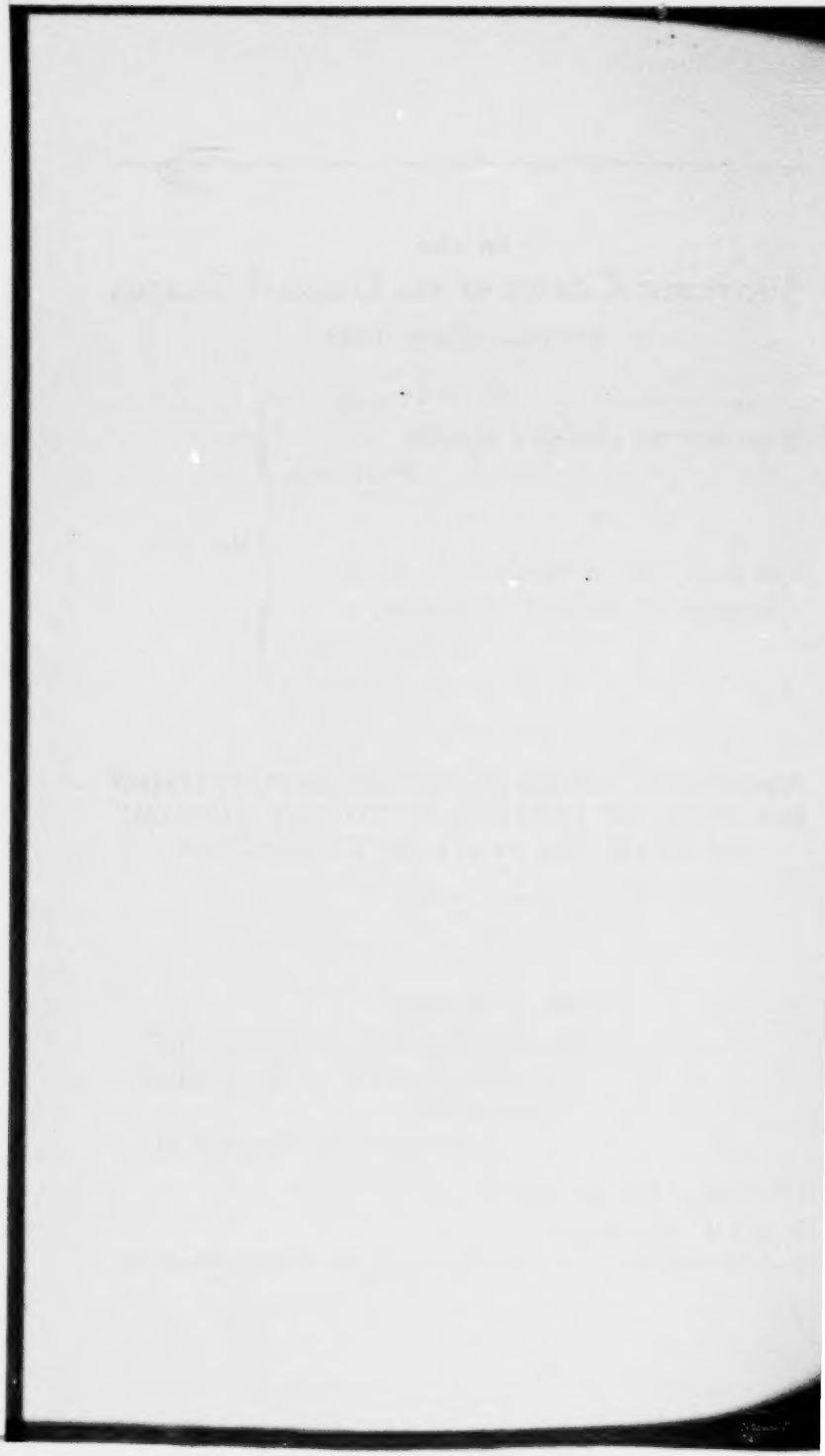

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In the

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WASHINGTON PENSION UNION, *Petitioner,* vs. THE STATE OF WASHINGTON, on the Relation of Dana T. Robinson, *Respondent.*	No. 221

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Comes now the Respondent, The State of Washington on the Relation of Dana T. Robinson, and prays the Court that the Writ of Certiorari sought by the Petitioner herein be denied, and submits this Brief in opposition to the Petition for said Writ.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Washington is reported in 130 Wash. Dec. 179 and 191 P.(2d) 241, and appears in the Record filed herein by Petitioner at R. 54, *et seq.*

The Order Denying Petition for Rehearing is reported in 130 Wash. Dec. 673, 191 P.(2d) 241 (R. 116).

STATEMENT OF THE CASE

This litigation is an action initiated in the Supreme Court of the State of Washington, seeking a Writ of Mandamus to compel the Respondent below, Russell H. Fluent, Treasurer of the State of Washington, to honor and pay a warrant drawn by the State Auditor on the said State Treasurer in payment of compensation of the Relator below, Dana T. Robinson, for services rendered as an employee of the Joint Legislative Fact-finding Committe of the Legislature of the State of Washington. The Relator's right to collect upon said warrant was challenged by the said State Treasurer and, following a hearing before the Supreme Court of the State of Washington, a Writ of Mandamus was issued requiring that the warrant be paid. During the pendency of the cause in the State Supreme Court, the Petitioner here, Washington Pension Union, sought and was granted leave to intervene in the proceedings and did so by filing in said Court a petition in intervention (R. 11), a brief in support thereof (see excerpts, R. 43) and, through counsel, participated in presentation of the case on argument.

The case was decided, a Writ of Mandamus issued (R. 112) and thereupon said Writ was, by the respondent State Treasurer, fully obeyed.

The Petitioner here (intervener below) thereupon filed a Petition for Rehearing in the State Court (see excerpts, R. 114) which was by the Court denied (R. 116).

The Intervener, in its Petition in Intervention, (R. 11) set out that it was a Washington corporation, engaged as a service and information organization to assist and advise the public generally and various persons, particularly enumerated, including public officials; That the 30th regular Session of the Legislature of the State of Washington had created a Joint Legislative Fact-Finding Committee on Un-American Activities; That this Committee had made a certain public announcement relative to an investigation of Intervener and its relationship to Communists; that a hearing had been held at which certain witnesses had made statements regarding Intervener which were published; that Intervener had no opportunity to cross-examine witnesses and was damaged by the publicity. Said Petition in Intervention further stated that Intervener had commenced theretofore an action in the appropriate Washington State Court against the members of said Committee alleging that Intervener was and would be damaged by the activities of the Committee and seeking to enjoin said Committee from following a certain course of conduct and to recover damages, which action is still pending; that a restraining order which had been issued by the Court in which said action was pending, had been dissolved. Intervener further alleged that if the bills incurred by the said Committee were to be paid it would continue to function and that, by reason thereof, Intervener had an interest in the action, and said Petition in Intervention concluded with a general allegation that the Committee is not a lawful committee of the Legislature of the State of Washington

and that no appropriation of funds had been made for said committee or for the payment of the Warrant upon which the application for a Writ of Mandate was predicated. It was prayed by the Intervener that the Mandamus procedings be dismissed.

No affirmative relief was sought by the Intervener. No Federal question was raised by said pleading in intervention.

In determining the Relator's right to compel payment of his warrant, it was necessary for the State Supreme Court to determine first, whether the Legislative Committee was created by the Legislature in a proper manner, that is, whether the State Legislature could, under the Constitution of the State of Washington, create an "Interim" Committee by joint resolution of the two houses composing said Legislature, and, second, whether funds had been appropriated for the purpose of paying the expenses of the Committee.

The Supreme Court of the State of Washington upheld the method of creating the Committee, and held that funds were available for the payment of the warrant, and accordingly, the Writ of Mandate applied for by Relator was issued (R. 112). No other question was passed upon. The state court, in its opinion, concluded, "No other questions of substantial merit are presented" (R. 85).

The Joint Resolution No. 10, under which the committee was created and functions (R. 5), among other things, provides:

"Whereas, These are times of public danger;

subversive persons and groups are endangering our domestic unity, so as to leave us unprepared to meet aggression, and under cover of the protection afforded by the bill of rights these persons and groups seek to destroy our liberties and our freedom by force, threats and sabotage, and to subject us to the domination of foreign powers; and

"Whereas, Recent announcements by responsible officers of the Federal government indicate the seriousness of the problem. J. Edgar Hoover, Director of the Federal Bureau of Investigation recently said: 'During the past five years American Communists have made their deepest inroads upon our national life. Their propaganda, skillfully designed and adroitly executed has been projected into practically every phase of our national life. The Communist influence has projected itself into some newspapers, books, radio and the screen, some churches, schools, colleges and even fraternal orders have been penetrated, not with the approval of the rank and file, but in spite of them'; and

"WHEREAS, State Legislation to meet the problem and to assist law enforcement officers can best be based on a thorough and impartial investigation by a competent and active legislative committee;

"NOW, THEREFORE, Be It Resolved, That there is hereby created a Joint Legislative Fact-finding Committee on Un-American Activities in the State of Washington which shall investigate, ascertain, collate and appraise all facts concerning individuals, groups or organizations whose activities are such as to indicate a purpose to foment internal strife, discord and dissension;

infiltrate and undermine the stability of our American institutions; confuse and mislead (fol. 7) the people, and impede the normal progress of our state and nation either in a war time or a peace time economy; and

"Be it further resolved, That in addition to other duties imposed upon the Committee, the Committee shall investigate the activities of groups and organizations whose membership includes persons who are Communists, or any other organization known or suspected to be dominated or controlled by a foreign power, which activities affect the conduct of this state, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions of this state supported in whole or in part by state funds, or any political program;

* * * *

"(1) To employ and fix the compensation of a secretary and such clerical, legal, expert and technical assistants as it may deem necessary, and to lease, rent or buy such supplies and facilities as may be required;

* * * *

"(5) To hold public hearings at any place in the State of Washington at which hearings the people are to have an opportunity to present their views to the committee;

"(6) To make a complete study, survey and investigation of every phase of the subject of this resolution, including but not limited to the operation, effect, administration, enforcement, and needed revision of any and all laws in anywise bearing upon or relating to the subject of this resolution;

"To meet at any and all places in this state, in public or executive session;

"To act during this session of the legislature, including any recess, hereof, and after final adjournment hereof until commencement of the thirty-first legislature.

"To file a report with the thirty-first legislature."

Attorneys for Petitioner in the state court, Respondent here, were special assistants attorney general of the State of Washington appointed pursuant to Rem. Rev. Stat. §11034-3 which is set forth in Appendix "A" attached hereto.

It is to be noted that Respondent State Treasurer did not seek a re-hearing in the State Court and has not applied for a review in this Court, but has complied with the Writ of Mandamus issued by the State Supreme Court and has paid the warrant in question in full. (See Affidavit of Dana T. Robinson appended hereto as Appendix "B" and made a part of this Brief.)

ARGUMENT

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied for the following reasons:

1. No substantial Federal constitutional question is raised.

2. The purported Federal question was not properly and timely raised in the State court.

3. Petitioner has no capacity to sue and is not only not the real party in interest but has no legal, jus-

ticiable interest in this action sufficient to give this Court jurisdiction.

4. The decision of the State Court turned entirely upon state and local law, and it was not necessary to consider or pass upon any Federal question to determine the action, the purported Federal question suggested by Intervener being immaterial and unsubstantial. The actions and conduct of the Legislative Fact-finding Committee were not in issue in the present proceedings and constitute an issue in another action now pending to which Intervener (petitioner here) is a party (R. 16).

5. The case has become a *moot* case because the warrant, payment of which was sought to be compelled, has been paid in full by the Respondent State Treasurer, and there is now no actual controversy involving real and substantial rights between the parties to the record and no subject matter upon which the judgment of this Court can operate. Any opinion of this Court would be advisory only.

6. Neither the decision of the Supreme Court of the State of Washington nor House Concurrent Resolution No. 10, creating the Legislative Committee, nor any action of said Committee has, or will, deprive Petitioner here of any constitutional right.

7. The facts in this case are not within the statute relative to the issuance of a Writ of Certiorari by this Court to a State Court (Sec. 237-b of the Judicial Code, as amended by Act of February 13, 1925, Ch. 229, Sec. 1; 28 U.S.C.A., 344-b). No statute or Constitutional right is involved.

ARGUMENT

No substantial Federal question is raised by the Petitioner. Petitioner contends that the House Concurrent Resolution No. 10 of the Legislature of the State of Washington (R. 5) on its face and as applied is repugnant to the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States. It then contends (Petitioner's Brief pp. 10-14) that because the Legislative Committee's attention, among other things, is directed to the activity of *Communists*, Petitioner is deprived of some vague right or privilege. This argument must be based upon the assumption that Petitioner is a Communist organization, or has some relation to the Communist Party that cannot be disclosed without in some way injuring Petitioner. The most that Petitioner can contend for itself (aside from its argument on behalf of the Communists who do not appear as parties to the record) is that at hearings held, and which may be held by the Committee, its reputation has been or may be in some way damaged by the testimony of various witnesses before the Committee. Respondent does not concede that such a possibility constitutes a deprivation of constitutional freedom. Certainly the payment of the state warrant, which is the sole and only subject matter of the present litigation, did not operate directly or indirectly to deprive Petitioner of anything or affect Petitioner in any way. The actions or conduct of the Legislative Committee, which is the Relator's employer, the nature of its inquiries, the testimony had upon its hearings, the

good, bad, or indifferent manner in which the members of the legislative committee carried out their public duties, were in no way before the State court or passed upon, nor did Petitioner itself, in its Petition in Intervention, (R. 11) seek to enjoin or bar the Committee from doing any act. On the contrary, the Petition in Intervention did not even mention as an issue the constitutional rights of which Petitioner now asserts it is being deprived.

Before this Court will take jurisdiction, the Federal question raised must be substantial and it must appear that the Petitioner has a right guaranteed by the Constitution of the United States which will suffer by the decision of the State court.

Tyler v. Judges of Court of Registration, 179 U. S. 405, 45 L. ed. 252, 21 S. Ct. 206, where the court stated, at p. 407:

> "In order that the validity of a state statute may be 'drawn in question' under the second clause of section 709, Rev. Stat., it must appear that the plaintiff in error has a right to draw it in question by reason of an interest in the litigation which has suffered, or may suffer, by the decision of the state court in favor of the validity of the statute."

See:

Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 89 L. ed. 1725. 65 S. Ct. 1384;

C.I.O. v. McAdory, 325 U. S. 472, 89 L. ed. 1741, 65 S. Ct. 1395;

Asbury Hospital v. Cass County, 326 U. S. 207, 90 L. ed. 6, 66 S. Ct. 61;

Seaboard Air Line Ry. v. Watson, 287 U. S. 86, 77 L. ed. 180, 53 S. Ct. 32.

The fact that the record may present in form only a Federal question is not enough to warrant taking jurisdiction.

Deming v. Carlisle Packing Co., 226 U.S. 102, 57 L. ed. 140, 33 S. Ct. 80.

In that case the purported Federal question was held to be frivolous and interposed for the purpose of delay, and damages were allowed the Respondents.

There must be a justiciable case or controversy. No abstract, hypothetical or contingent question will be passed upon.

Alabama State Federation of Labor, v. McAdory, supra;

Asbury Hospital v. Cass County, supra.

In the latter case, at p. 213 (p. 13 of 90 L. ed.), the court said:

> "This court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied."

This court has stated many times that it will exercise extreme caution in determining whether to invalidate the actions of a state and will not lightly assume facts which would render them invalid. *Asbury Hospital v. Cass County, supra*, where, at p. 215 (p. 13, 90 L. ed.) the court states:

> "Statutory discrimination between classes

> which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it."

See also:

> *Alabama State Federation of Labor v. McAdory, supra,*

where at p. 465 (p. 1737, 89 L. ed.), it is stated as follows:

> "When a statute is assailed as unconstitutional, we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part. * * * "

The refusal to permit an action for damages for libel contained in a privileged publication or communication raises no Federal question.

> *Abbott v. Tacoma Bank of Commerce*, 175 U. S. 409, 44 L. ed. 217, 20 S. Ct. 153.

Whether the requirements of the State Constitution were met is a local question. *Carfer v. Caldwell*, 200 U. S. 293, 50 L. ed. 488, 26 S. Ct. 264.

See also:

> *Smith v. Jennings*, 206 U. S. 276, 51 L. ed. 1061, 27 S. Ct. 610.

where this court said, at p. 278:

> "But the conformity with the state constitution of the proceedings in the enactment of the law is a question for the determination of the state court, and its judgment is final. * * * "

> *Welch v. Swasey*, 214 U.S. 91 (p. 104), 53 L. ed. 923, 29 S. Ct. 567.

where it is said:

> "We do not understand that the plaintiff in error makes the objection of illegality arising from an alleged delegation of legislative power to the commissions provided for by the statutes. At all events, it does not raise a Federal question. The state court holds that kind of legislation to be valid under the state constition and this court will follow its determination upon that question."

In determining the existence or non-existence of a Federal question, it must be borne in mind, and we reiterate: The actions or conduct of the Committee are not an issue in the case.

As long as some proper purpose is included in the resolution creating the Committee, the fact that the subject investigated or to be investigated is one which *might* result in invalid legislation is no reason to strike down the considered actions of a state legislature. No statute is here in question. The Committee is merely an investigating body seeking facts for the use of the coming Legislature of the State of Washington. Whether actual legislation results from the activities of the Committee, and the nature and provisions of such legislation, are to be determined by the Legislature as a whole when next it convenes. In the meantime it must learn facts and be educated to act intelligently. The Petitioner here seeks to prevent anyone from talking about it and thus to restrict the activities of others, including the State of Washington, in the exercise of the very freedom of speech Petitioner purports to preserve.

The resolution creating the Legislative Committee nowhere singles out the Washington Pension Union

or mentions it. If the Committee improperly exceeds its powers, Petitioner is free to seek whatever remedy it deems appropriate. In the meantime the Legislature of the State should not be frustrated in making legitimate and necessary inquires, which function is a legitimate part of and inherent in the legislative power.

The purported Federal question was not properly and timely raised. The manner in which the purported Federal question was raised by Petitioner is of interest. As we pointed out, the petition in intervention (R. 11) nowhere purported to raise a Federal question. In this pleading, Intervenor, Petitioner here, raised the question of the legality of the method of creation of the Committee and asserted lack of appropriation of funds with which to pay the Committee's expenses. In Petitioner's brief some reference was made to the Constitution of the United States (see excerpts R. 43, *et seq.*). However, in its petition in intervention Petitioner did not seek to assert Federal rights or assert any right whatever or seek the enforcement or protection of any such right. Intervener contented itself with alleging that it had pending another action asserting its rights. That other action (see R. 16, *et seq.*) is the one where the question, if any, is directly in issue and must be determined. It is not enough to raise a purported Federal question only incidentally and for the purpose of a prospective appeal to this Court. It (the question) must be seriously advanced and constitute a bone of contention between the parties.

East Tennessee, etc. Ry v. Frazier, 139 U.S. 288, 35 L. ed. 196, 11 S. Ct. 517.

A vague contention, as in the present case, will not give jurisdiction.

Seaboard Airline Ry. v. Watson, 287 U.S. 86, 77 L. ed. 180, 53 S. Ct. 32.

Again, assuming there is a Federal question that might be raised in this matter, how can this Petitioner raise it? What is its interest? This is simply an action to recover money on a warrant issued to a state employee. The sole question ultimately to be determined is whether or not the State Treasurer may be required to pay the warrant. Assume that the Petitioner may in some way have an interest in the continuance or cessation of the activities of the Legislative Committee. Further assume that it may be entitled to sue for damages to its reputation (it has done so). Assume it might, through its members, decline to appear and respond to inquiries by the Committee or to produce corporate records. Assume it might bring proceedings to enjoin the Committee from functioning (it has attempted to do so in another proceeding). Where is Petitioner's interest in the case at bar? It has no interest in the warrant; it does not show itself to be a taxpayer; its funds are not being spent; it has no legal or justiciable interest in the controversy which is the subject matter of the case at bar. It is a mere onlooker who was permitted by the State Court to appear before it in the case because the decision in the case at bar might be considered as of some force as a precedent in the

other and completely different litigation then and now pending, in which Petitioner is directly interested. Petitioner's legitimate status in this case is no greater than that of any *amicus curiae*. It not only lacks capacity to sue, but its status is such that the purported Federal question cannot be raised by it in this Court.

Braxton County Court v. West Virginia, 208 U.S. 192, 52 L. ed. 450, 28 S. Ct. 275.

where it is said, p. 197:

> "Again, that the act of the State is charged to be in violation of the National Constitution, and that the charge is not frivolous, does not always give this court jurisdiction to review the judgment of a state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in and affected adversely by the decision of the state court sustaining the act, and the interest must be of a personal and not of an official nature."

See also:

Frothingham v. Mellon, 262 U.S. 447, 67 L. ed. 1078, 43 S. Ct. 597.

where, in holding that neither the State of Massachusetts, acting on behalf of its citizens, nor a taxpayer, had a standing in this Court, it is stated, p. 480 (p. 1082, L. ed.):

> "We have reached the conclusion that the cases must be disposed of for want of jurisdiction without considering the merits of the constitutional questions.
>
> "In the first case, the state of Massachusetts presents no justiciable controversy either in its own behalf or as the representative of its citizens. The appellant in the second suit has no such in-

terest in the subject-matter, nor is any such injury inflicted or threatened, as will enable her to sue."

and again at p. 484 (p. 1084, L. ed.) this Court quoted the following language with approval:

"'It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.

"'This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here.'

* * * * * * * * * * *

"It follows that in so far as the case depends upon the assertion of a right on the part of the state to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of persons or property, not rights of dominion over physical domain, not quasi sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government."

In *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 45 L. ed. 252, 21 S. Ct. 206, this Court said:

"Other persons, whether residents or non-residents, whose rights might be injuriously affected by the decision, might lawfully complain of the unconstitutionality of an act which would deprive them of their property without notice; but it is difficult to see how the petitioner would be affected by it. * * *

> "It is true that his competency to institute these proceedings does not seem to have been questioned by the Supreme Court of Massachusetts. It may well have been thought that to avoid the necessity and expense of appearing before an unconstitutional court and defending his rights there, he had sufficient interest to attack the law, which lay at the foundation of its proposed action; but to give him a *status* in this court he is bound under his petition to show, either that he has been, or is likely to be, deprived of his property without due process of law, in violation of the Fourteenth Amendment; and as no such showing has been made, we cannot assume to decide the general question whether the Commonwealth has established a court whose jurisdiction may, as to some other person, amount to a deprivation of property."

Thus, the mere fact that the State Court permitted intervention is not binding upon this Court. The facts and records must determine the Petitioner's status in this Court.

> *Tyler v. Judges of Court of Registration, supra.*

Petitioner, Washington Pension Union, has no *legal* interest in this controversy.

In *Lampasa v. Bell*, 180 U.S. 276, 45 L. ed. 527, 21 S. Ct. 368, it is said (pp. 283 and 284):

> "We said in *Clark v. Kansas City*, 176 U.S. 114 (quoting from Cooley's Constitutional Limitations, section 196), that '"a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in de-

> feating it'." That is, a legal interest in defeating it. The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance. 'To this extent only is it necessary to go, in order to secure and protect the rights of all persons, against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose.' (Citation)."
>
> *Smith v. Indiana*, 191 U.S. 138, 48 L. ed. 125, 24 S. Ct. 51.

A case squarely in point is *Boston Towboat Co. v. U.S.*, 321 U.S. 632, 88 L. ed. 975, 64 S. Ct. 776, where intervention was granted in the lower court to a party who was interested in the decision in the proceedings for the reason that the same would be a precedent in matters of a similar nature in which Intervener was involved. It was held that the Intervener did not have the right or capacity to separately appeal to this Court. This Court stated, p. 633 (p. 977 L. ed.):

> "We are of opinion that Boston's interest in the outcome of the Cornell litigation is insufficient to entitle it to take a separate appeal (Citing statutes). Whether Boston had sufficient interest to intervene as of right before the Commission and in the District Court we need not decide, the issue here being only whether Boston has such an 'independent right which is violated' by the decision against Cornell as will support an independent appeal." (Citing cases).

Petitioner here is not even a taxpayer, and even if it were would have no standing. This is true under Federal rulings, *Frothingham v. Mellon, supra*, and

under the decisions of the Supreme Court of the State of Washington, the latest of which discussing the matter is *Reiter v. Wallgren*, 28 Wn.(2d) 872, 184 P.(2d) 571.

The petition in intervention in the State Court itself was demurrable under state court practice on the ground that it stated no cause of action and that petitioner had no capacity to sue. Vol. 2, Rem. Rev. Stat., Sec. 259 (See Appendix "C" hereto).

No federal question was involved in the state court's decision. The case and the decision turned entirely on local questions relating to the powers of the Legislature under the State Constitution and the presence or absence of a legal appropriation of state funds under the limitations of the State Constitution. The Supreme Court, after passing upon local problems, merely stated "No other questions of substantial merit are presented." (R. 85). No right of the Intervener was discussed or passed upon or determined in any way.

No stronger statement excluding the idea that Intervener's rights were passed upon could properly be made than the foregoing quotation. It was not necessary for the Supreme Court of the State of Washington to pass upon any federal question, as none exists in this case. Certainly a propaganda or lobbying organization which is not even a taxpayer should not be permitted to interfere with the activities of the State Legislature and with the expenditure of State funds in payment of its employees.

Another reason exists which makes any review in

this litigation unnecessary and highly improper. The sole and only question to be ultimately decided in the pending litigation is whether or not the relator is entitled to recover upon a certain State warrant. The warrant has been paid in full (see affidavit of Dana T. Robinson appended hereto as Appendix "A"). The only purpose of the action was to compel payment of the warrant issued to Mr. Robinson. Thus the entire subject matter of the controversy has been extinguished. This court has nothing left upon which its judgment can operate. In such a situation this court has many times, and without exception, refused to review the decision of a State Court.

In *Little v. Bowers*, 134 U.S. 547, 33 L. ed. 1016, 10 S. Ct. 620, a test case involving certain taxes was dismissed upon a showing that the taxes in question had been paid. In the opinion, Your Honors, stated, p. 556:

> "It is true that the judgment of the court below stands unsatisfied except so far as relates to the costs, which, as before stated, have been paid; but that is immaterial, inasmuch as the controversy upon which that judgment was rendered had been extinguished. That in effect satisfied the judgment. Neither the affirmance nor the reversal of that judgment would make any difference as regards that controversy brought here by this writ of error. It matters not that the taxes from 1884 to 1887, inclusive, were paid under duress. They are in nowise before the court; and according to the showing of the plaintiff in error they differ materially from the taxes in dispute in this case.
>
> "It is well settled, that when there is no actual

controversy, involving real and substantial rights, between the parties to the record, the case will be dismissed."

and, again, on p. 558:

"If, as is contended on behalf of the plaintiff in error, the question involved in this case is one of great importance to the railroad company and to the State, and is identical with that in a number of other cases pending in the court below, so much the more important is it that it should not be decided in a case where there is nothing in dispute."

See also:

Kimball v. Kimball, 174 U.S. 158, 43 L. ed. 932, 19 S. Ct. 639;

Tennessee v. Condon, 189 U.S. 64, 47 L. ed. 709, 23 S. Ct. 579;

American Book Co. v. Kansas, 193 U.S. 49, 48 L. ed. 613, 24 S. Ct. 394.

In the latter case (at p. 51) the court stated:

"It is also urged that another suit has been brought by the same law officer of the State in the name of the State, in the District Court of Shawnee County, which suit is pending in the Supreme Court on appeal from the ruling of the District Court denying a temporary injunction, and that it is contended by the State the judgment of the Supreme Court in the case at bar was an adjudication of a non-compliance of plaintiff in error with the statutes of the State. And it is alleged, that the same defenses were made as in the case at bar. It is hence contended that 'there still exists a controversy, undetermined and unsettled,' involving the right of the

State to enforce the statute against a corporation engaged in interstate commerce.

"The motion to dismiss must be granted. We said in *Mills v. Green*, 109 U.S. 651:

" 'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that, when pending an appeal from the judgment of a lower court and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment but will dismiss the appeal. And such a fact, when not appearing on the record, may be provided by extrinsic evidence.' * * *

"The case at bar is certainly within the principle. The judgment has been complied with. * * * After compliance there is nothing to litigate."

See:

Security Life Ins. Co. v. Prewitt, 200 U.S. 446, 50 L. ed. 545, 26 S. Ct. 314;

Mills v. Green, 159 U.S. 651, 40 L. ed. 293, 16 S. Ct. 132;

Jones v. Montague, 194 U.S. 147, 48 L. ed. 913, 24 S. Ct. 611;

California v. San Pablo, etc. Ry., 149 U.S. 308, 37 L. ed. 747, 13 S. Ct. 876;

Lord v. Veazie, 8 Howard 251, 49 U.S. 251, 12 L. ed. 1067.

The fact that the case has become moot can be proved by extrinsic evidence.

Kimball v. Kimball, supra;

Jones v. Montague, supra;

Lord v. Veazie, supra.

Regardless of any other question in the case, the foregoing authorities require the denial of the petition for a writ of certiarari. Further, a review of the record presented in this case will readily disclose that no rights of any kind of the Petitioner have been invaded, properly or otherwise.

Legislatures must make inquiries at times in order to act intelligently. The right of legislatures to make such inquiries has been upheld at all times. See *U.S. v. Josephson*, 165 F.2d 82 (Cert. den. 92 L. ed. Adv. Op. 425, Rehearing Den. 92 L. ed. Adv. Op. 630). Petitioner has not been required to do or refrain from doing a single act. There is pending an action in which it seeks redress for its imaginary wrongs and it is free to pursue any remedy it may find open and available. In the meantime, Petitioner should not be permitted, under the guise of freedom of speech, to interfere with the same right on the part of others, particularly in litigation in which it has not the remotest legal interest.

CONCLUSION

It is respectfully submitted that the application for a writ of certiorari should be denied.

FORD Q. ELVIDGE,
Special Assistant to SMITH TROY,
Attorney General of the State of Washington,
Counsel for Respondent.

910 Dexter Horton Building,
Seattle 4, Washington.

APPENDIX "A"

REMINGTON'S REVISED STATUTES OF WASHINGTON, 1941 Supplement, Section 11034-3, being Chapter 50 of the Session Laws of the State of Washington, 1941, Section 1 provides as follows:

"Additional powers and duties—Employment of attorneys and clerks—Compensation. In addition to the powers and duties now given the Attorney General of the State of Washington by law, he shall also have the power, and it shall be his duty, to represent the State of Washington and all officials, departments, boards, commissions and agencies of the State of Washington in the courts and before all administrative tribunals or bodies of any nature in all legal or quasi legal matters, hearings or proceedings, and to advise all officials, departments, boards, commissions or agencies of the State of Washington in all matters involving legal or quasi legal questions, except where it is otherwise provided by law to be the duty of the Prosecuting Attorney of any county; and it shall be the duty of the Attorney General of the State of Washington, and he shall have the power, to employ or discharge sufficient attorneys and clerk to transact for the State of Washington, its departments, officials, boards, commissions and agencies, all business of a legal or quasi legal nature, except where it is provided by law to be the duty of the judge of any court, or the Prosecuting Attorney of any county, and the Attorney General shall fix the salary and compensation for all such attorneys and employeeys, and in the event such attorneys or employees are assigned to any department, board or

commission, such department, board or commission shall pay the salary or compensation of such persons, as fixed by the Attorney General, not exceeding the funds made available to the department be law for legal services."

APPENDIX "B"

SUPREME COURT OF THE UNITED STATES

October Term, 1948

WASHINGTON PENSION UNION, *Petitioner,* vs. THE STATE OF WASHINGTON, on the Relation of DANA T. ROBINSON, *Respondent.*	No. 221

AFFIDAVIT OF DANA T. ROBINSON

State of Washington, } ss.
County of King }

DANA T. ROBINSON, being first duly sworn, on oath deposes and says:

That he is the Relator and Respondent in the above entitled cause now pending in the Supreme Court of the United States. That he is and was the Relator in that certain cause in the Supreme Court of the State of Washington, being cause No. 30523 of the files and records of said court and entitled THE STATE OF WASHINGTON ON THE RELATION OF DANA T. ROBINSON, RELATOR, v. RUSSELL H. FLUENT, STATE TREASURER, RESPONDENT, WASHINGTON PENSION UNION, INTERVENER.

That the foregoing action in the Supreme Court of the State of Washington was commenced for the pur-

pose of securing a Writ of Mandate to compel the State Treasurer to pay a warrant drawn by the State Auditor on the State Treasurer in payment of compensation of this Affiant for services rendered to the Joint Legislative Fact Finding Committee on Un-American Activities created by House Concurrent Resolution No. 10 of the 1947 Legislature of the State of Washington. That said warrant payable to the affiant was General Fund Payroll warrant of the State of Washington No. 285369 and was in the sum of $291.43. That a copy of said warrant appears in the printed transcript of record filed in the Supreme Court of the State of Washington in Cause No. 221 of files and records of the October Term, 1948, of said court at page 8A. That in said cause in the Supreme Court of the State of Washington, a Decision was had and a Writ of Mandate issued on March 19, 1948, commanding and directing the Respondent Russell H. Fluent, Treasurer of the State of Washington, to forthwith pay said warrant. That pursuant to said Writ of Mandate issued in said court and cause and in compliance therewith, the said Russell H. Fluent, Treasurer of the State of Washington on or about the 20th day of March, 1948, did pay said warrant in ful land did deliver to affiant the sum of $291.43.

That by reason of the foregoing, said warrant, which was the subject matter of the controversy in the proceeding of the Supreme Court of the State of Washington above mentioned, has been paid in full and extinguished, and there is now no controversy remaining, nor does affiant claim any further rights against the State of Washington or the Treasurer

thereof by virtue of those matters and things set forth in the pleadings in said action in the Supreme Court of the State of Washington.

Dana T. Robinson

DANA T. ROBINSON

SUBSCRIBED AND SWORN to before me this 15th day of September, 1948.

Monroe Watt

MONROE WATT

Notary Public in and for the State of Washington, residing at Seattle.

APPENDIX "C"

Volume 2, REMINGTON'S REVISED STATUTES OF WASHINGTON, Section 259, provides as follows:

"The defendant may demur to the complaint when it shall appear upon the face thereof either,

1. That the court has no jurisdiction of the person of the defendant or of the subject matter of the action;

2. That the plaintiff has no legal capacity to sue; or

3. That there is another action pending between the same parties for the same cause; or

4. That there is a defect of the parties, plaintiff or defendant; or

5. That several causes of action have been improperly united;

6. That the complaint does not state facts sufficient to constitute a cause of action;

7. That the action has not been commenced within the time limited by law."